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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Petitioner*,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

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QUESTION PRESENTED

Whether a commuter authority covered by the Northeast Rail Service Act of 1981 is subject to the labor transfer provisions of said Act when it contracts for the sale of commutation tickets which are specifically mentioned in the statutory definition of "commuter service" in said Act.

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SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT, REGIONAL RAIL REORGANIZATION ACT OF 1973

The petitioner, Railway Labor Executives' Association ("RLEA"), respectfully prays that a writ of certiorari issue to review the judgment of the Special Court, Regional Rail Reorganization Act of 1973 entered in this case on September 28, 1982.

OPINION BELOW

The opinion of the Special Court, not yet reported, appears in the Appendix (hereinafter designated "App.") at 1a-15a.

JURISDICTION

The judgment of the Special Court was entered on September 28, 1982, (App. 16a). This petition is governed

by § 1152(b) of the Northeast Rail Service Act of 1981, which provides that judgment of the Special Court shall be reviewable only upon petition for a writ of certiorari to this Court to be filed not more than twenty (20) days after the entry of an order of the Special Court (App. 24a).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Northeast Rail Service Act of 1981 ("NERSA"), including pertinent amendments to the Rail Passenger Service Act ("RPSA") and the Regional Rail Reorganization Act of 1973 ("3R Act") are set forth in the Appendix at pp. 20a-23a.

STATEMENT

Proceedings Below

This case arose out of the announced intention of the Southeastern Pennsylvania Transportation Authority ("SEPTA") to take over the ticket selling function from the Consolidated Rail Corporation ("Conrail") in providing rail commuter service in the Philadelphia area without complying with the labor transfer provisions of NERSA. SEPTA is a "commuter authority" as defined in § 1135 of NERSA, amending § 102 of the 3R Act, 95 Stat. 646. SEPTA is a corporation organized under the Pennsylvania Urban Mass Transportation Law, Act of January 22, 1968, P.L. 42, No. 8, as amended by the Act of July 10, 1980, P.L. 427, No. 101, 55 P.S. § 600.101, *et seq.* SEPTA is one of the "commuter authorities" expressly mentioned in the definition section of NERSA, § 1135. *RLEA* v. *SEPTA*, 534 F. Supp. 832, 834 (Sp. Ct. RRRA), *cert. denied*, ____ U.S. ____, 73 L.Ed.2d 1285, 102 S. Ct. 2271 (1982) ("*SEPTA I* ").

The RLEA is an unincorporated association comprised of the chief executive officers of virtually all the standard

national and international railway labor unions in the United States, including those having collective-bargaining agreements with Conrail, which were negotiated in accordance with the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the 3R Act, 45 U.S.C. § 771, *et seq. SEPTA I*, 534 F. Supp. at 834.

The RLEA filed this action in the Special Court for a declaratory judgment and preliminary and permanent injunctive relief that would prevent SEPTA from taking over from Conrail the ticket selling function for rail commuter service provided in the Philadelphia area without complying with the labor transfer provisions of NERSA (§§ 508 and 510 of the RPSA), which require implementing agreements and collective-bargaining agreements with representatives of Conrail employees prior to operation of commuter service (App. 4a-7a). The particular act which RLEA complained of was SEPTA's announced intention to assume performing through a contractor the ticket selling functions being provided by Conrail and Conrail employees represented by the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes ("BRAC"), a constituent member of the RLEA (App. at 3a).

The complaint alleged that the selling of tickets constituted "commuter service" as defined in § 1135 of NERSA, and prayed for a declaration that SEPTA must negotiate and arbitrate, if necessary, an implementing agreement with Conrail and BRAC and negotiate a collective-bargaining agreement with BRAC prior to assuming that function pursuant to §§ 508 and 510 of the Rail Passenger Service Act ("RPSA"), as amended by § 1145 of NERSA (App. at 4a). RLEA also sought an injunction prohibiting SEPTA from contracting out the ticket selling function without first complying with the

labor transfer provisions of NERSA contained in § 1145 of that Act.

The Special Court heard this matter on RLEA's Motion for a Preliminary Injunction filed on June 15, 1982 (App. 7a) based upon the stipulated facts filed June 28, 1982, and an evidentiary hearing held July 1, 1982 (App. 7a-8a). At oral argument on July 16, 1982, the Special Court informed the parties that in accordance with Rule 65(a)(1) Fed. R. Civ. P., the trial on the merits would be advanced and consolidated with the hearing on the Motion for Preliminary Injunction (App. 8a). The Special Court in a judgment dated September 28, 1982, denied RLEA's Motion for Preliminary Injunction and dismissed the complaint on its merits (App. 16a), holding that the transfer of the ticket selling function from Conrail to SEPTA was routine and minor, and although involving a larger number of positions, was not substantially dissimilar to the assumption by SEPTA of janitorial, grass cutting, and police functions assumed by SEPTA and held not to be subject to the labor transfer provisions of NERSA in *RLEA* v. *SEPTA*, 534 F. Supp. 852 (Sp. Ct. RRRA 198 ("*SEPTA II* ") and *International Brotherhood of Teamsters* v. *SEPTA*, 539 F. Supp. 1222 (Sp. Ct. RRRA 1982) ("*SEPTA III* "). The Special Court did not specifically deal with RLEA's lead argument that the sale of tickets was specifically mentioned in NERSA's statutory definition of "commuter service" making earlier precedent inapplicable (App. 23a).

Facts

Before April 1, 1976, SEPTA subsidized rail commuter service on thirteen (13) lines radiating from center city, Philadelphia operated by the Reading and Penn Central Railroads, and later by their reorganization trustees,

serving the five (5) southeastern Pennsylvania Counties of Bucks, Chester, Delaware, Montgomery, and Philadelphia. After the transfer of those rail properties to Conrail on April 1, 1976, Conrail continued to operate the commuter service formerly furnished by those transferor railroads and their trustees and received subsidy payments from SEPTA pursuant to § 304(e) of the 3R Act. *SEPTA I*, 534 F. Supp. at 834.

After the passage of NERSA, SEPTA announced its intention to operate virtually all the commuter services then operated by Conrail out of the Reading Terminal in Philadelphia on its own without complying with the labor transfer provisions of NERSA, commencing with a rail diesel car line known as the Fox Chase-Newtown Branch. *SEPTA I*, 534 F. Supp. at 835. RLEA brought *SEPTA I* to the Special Court to enjoin SEPTA from accomplishing this proposed takeover. On January 27, 1982, the Special Court issued its opinion in *SEPTA I*, holding that any rail commuter service operated by Conrail on the effective date of NERSA (August 13, 1981) was subject to the labor transfer provisions of NERSA if a commuter authority intended to operate the service on its own behalf. SEPTA petitioned this Court for a writ of certiorari to review the decision of the Special Court in *SEPTA I*, which was denied May 24, 1982 ___ U.S. ___, 73 L.Ed.2d 1285, 102 S. Ct. 2271 (1982).

SEPTA then announced its intention to assume janitorial and grass cutting functions performed by Conrail employees without complying with the labor transfer provisions of NERSA. *SEPTA II*, 534 F. Supp. at 853. In an opinion dated March 11, 1982, the Special Court permitted SEPTA to go forward with its plan since in the Court's view, janitorial and grass cutting services were not intended to be covered by the labor transfer provi-

sions of NERSA, but holding in essence that SEPTA could not contract out "commuter service" being performed by Conrail on the effective date of NERSA without first complying with the labor transfer provisions of NERSA. *SEPTA II*, 534 F. Supp. at 857.

SEPTA next announced its intention to itself assume police functions previously performed by employees of Conrail without complying with the labor transfer provisions of NERSA. The Special Court in an opinion dated May 21, 1982, permitted SEPTA's action on essentially the same ground as *SEPTA II*. *SEPTA III*, 539 F. Supp. 1222.

SEPTA then announced its intention to contract out the ticket selling function, first on the side of the former Reading Railroad without complying with the labor transfer provisions of NERSA. The Special Court, applying the standard set forth in *SEPTA II* and *SEPTA III*, determined that the sale of tickets was not intended to be covered by the labor transfer provisions of NERSA (App. at 23a), even though the Court found that all of the criteria set forth in *SEPTA II* had not been met by SEPTA in the case at bar, specifically, that Conrail had never consented prior to NERSA to the transfer of such function (App. 12a) and that the ticket selling involved a substantially larger number of employees (132) than janitorial, grass cutting (32), or police functions (14) (App. 14a). The Court did not address the issue raised by RLEA that the specific mention of the sale of commutation tickets and NERSA's definition of "commuter service" precluded any application of the *SEPTA II* criteria.

REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with a long line of decisions of this Court which hold that in all cases involv-

ing statutory construction, the starting point must be the language employed by the Congress. *See, American Tobacco Co.* v. *Patterson*, ___ U.S. ___, 71 L.Ed.2d 748, 755 (1982); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). It also conflicts with this Court's view that legislative purpose is expressed by the ordinary meaning of words used in a statute, and that the language used is ordinarily conclusive. *Consumer Products Safety Commission* v. *G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Richards* v. *United States*, 369 U.S. 1, 9 (1962). What the Court below did in the case at bar was to sit as a super-legislature and create statutory distinctions where none were obviously intended by the explicit language of the definitional portion of the stature, which is clearly contrary to past holdings of this Court. *American Tobacco Co.* v. *Patterson, supra*, 71 L.Ed.2d at 757, n.6; *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965).

The issue presented is of major importance since the smooth transition from Conrail to the commuter authorities explicitly envisioned by the Congress in NERSA hangs in the balance. The importance of the issue in the case at bar extends far beyond the Special Court's violation of the cardinal rule of statutory construction that statutes plain on their face mean exactly what they say, to the ability of the Congress to be free within the bounds of the Constitution to legislate toward such ends as it chooses without interference from the Judiciary, particularly given the intensive federal concern with railroads in general. *See, U.S. Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980). These considerations warrant review by this Court.

1. The general panel of the Special Court in *SEPTA I*, made it crystal clear that if a commuter authority intended to operate "commuter service," it was bound by

the labor transfer provisions of NERSA, holding that any other result based upon the language of the statute would substantially thwart the expressed Congressional will and the Government's interest in minimizing future costs for Conrail and itself and in seeking to preserve labor peace and employee morale. *SEPTA I*, *supra*, 534 F. Supp. at 851. When the General Panel[1] was faced with the argument from SEPTA in *SEPTA II* that the limitations of *SEPTA I* were not applicable if a commuter authority intended to contract out a function rather than operate itself, it found no difference in the two situations, stating:

> From this perspective, we accept, at least *arguendo*, that as a general proposition, § 508(a)'s phrase "commuter authorities that intend to operate commuter service" must be read to include commuter authorities that proposed to transfer the operation of such service to a subcontractor. We say this because this disorder and adverse effects on Conrail would be of precisely the same character and magnitude whether a commuter authority operates its own service or makes use of an independent contractor to do so. Since Congress intended to prevent the harm in one situation we see no reason why it would not have done so in the other. Moreover § 508(a)'s requirement regarding the direct operation of commuter service by a commuter authority would serve little purpose if it could be put at naught by use of an independent contractor.
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> 534 F. Supp. at 856.

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[1] On May 20, 1982, after the decisions in SEPTA I, SEPTA II, and SEPTA III, the Special Court, pursuant to Section 1152 of NERSA, asked the Judicial Panel on Multi-district Litigation to convene an 1152 Panel, which decided the case at bar. *See*, Rule 4, Rules of Special Court, 3R Act (App. 26a).

But the general panel in *SEPTA II* found that the statutory definition of "commuter service" did not provide much guidance with regard to the functions there involved, grass cutting and janitorial service. 534 F. Supp. at 856. Therefore, the Court found it necessary to construe and judicially gloss the statute with discernable standards that would provide some guidance for the future stating:

> Even assuming the foregoing, SEPTA's actions in the present case do not fall within the statute's terms. As noted above, NRSA's labor transfer provisions were designed to deal with a particular event—the transfer of Conrail's commuter operations to other entities. The perceived danger that this entailed was the massive dislocation of Conrail employees and the consequent disruption of Conrail's workforce. In the present case SEPTA is contracting for only a small part of the commuter service operations in the Philadelphia area, and the effect on Conrail will be minimal. Far more important, there are overwhelmingly reliable indications that SEPTA is not attempting to accomplish by degrees that which we think it may not do all at once. These indications are the discussions between SEPTA and Conrail in early January of 1981 regarding the desirability of contracting out for janitorial and grass-cutting services and the preparation of bid specifications and so forth by SEPTA in the spring of 1981—all well before NRSA was enacted. These events are important to our conclusion in two separate respects.
>
> First, they bear on whether SEPTA's conduct is within the range of actions by commuter authorities that § 508 was intended to regulate. As noted above, NRSA's labor transfer provisions were meant to deal with an unusual event, namely, the large-scale transfer of commuter operations from Conrail to other entities. Plainly, that is not the situation in this case. The pre-NRSA conduct of SEPTA and Conrail in-

dicates that contracting out for janitorial and grass-cutting services was merely one of the routine changes in the manner in which commuter service is provided to Philadelphia of the type those entities frequently had made. Moreover, it does not pose the danger to Conrail that inheres in the transfer of entire commuter service operations. If Conrail was satisfied that SEPTA's contracting out for janitorial and grass-cutting services would not adversely affect it, we do not think Congress would have perceived that such changes posed a threat to Conrail. In short, the character of the change in service sought by SEPTA and the pre-NRSA recommendations, discussions, and preparatory work indicate that the situation we face is not what concerned Congress when it enacted § 508.

The pre-NRSA actions of SEPTA and Conrail are important for another reason, namely, their bearing on SEPTA's intent, an issue that § 508(a), which predicates the labor transfer negotiating process on a commuter authority's "inten[t]" to operate commuter service, requires us to consider. Here, the pre-NRSA actions of SEPTA and Conrail clearly indicate that SEPTA is not attempting to circumvent the provisions of NRSA; rather, it is merely carrying out plans, approved by Conrail, that have been underway since before NRSA's enactment. To repeat the point made earlier, what SEPTA intends by the arrangement with Fernandez is not to "operate commuter service" but to continue its historic pattern of making minor adjustments in the way commuter service is provided in Philadelphia.

We need not decide precisely what factual showing by a commuter authority will satisfy the foregoing interpretation of § 508. This case involves very clear evidence of SEPTA's intent merely to make small-scale adjustments, consistent with historic practices, in the way commuter service is provided in Philadelphia, rather than to engage in the type of transfer

> envisioned by § 508. We will decide subcontract cases lacking evidence of pre-NRSA preparations and consent by Conrail or involving more substantial portions of Conrail's commuter operations, when and if they arise . . . 534 F. Supp. 856-57.

Both the General Panel in *SEPTA III* and the § 1152 Panel in the case at bar used the criteria set forth in *SEPTA II* to determine if the functions therein to be contracted out by SEPTA or assumed by it directly were subject to the labor transfer provisions of NERSA. And even though RLEA feels that the standards were incorrectly applied in the case at bar, the gravamen of its petition herein is that the only reason the considerations and criteria set forth above in the extensive quotation from *SEPTA II* were at all necessary was because the statutory definition of "commuter service" was of no aid with regard to any of the functions contained *SEPTA II* or *SEPTA III*, since none of them were referred to directly or indirectly in said definition. RLEA's point here is that the sale of commutation tickets was explicitly referred to in the statutory definition of "commuter service." And it is clear beyond peradventure of doubt in the explicit language of § 508(a) and in the General Panel's opinion in *SEPTA I* that a "commuter authority" that intends to operate "commuter service" is fully subject to the labor transfer provisions of NERSA, whether it intends to accomplish such commuter service itself (*SEPTA I*) or by means of a contractor (*SEPTA II*). The failure of the Special Court to have addressed this issue at all even though raised, effectively renders the statutory definition of "commuter service" nugatory. That cannot be permitted if the Congress is to legislate toward the ends it selects free from unwarranted judicial interpretation of statutory language.

CONCLUSION

The decision below is in direct conflict with decisions of this Court regarding the cardinal principle of statutory construction that plain and unambiguous statutory language must be given effect. It concerns the fundamental question of the freedom of the Congress to state what it means free from judicial interference. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Special Court.

Respectfully submitted,

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